IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA.Nos.510 and 511/Hyd/2022		
Assessment Years: 2015-16 and 2016-17		
Kaveri Infra Projects Pvt. Limited, Warangal. PAN : AAFCK5942D.	Vs.	DCIT, Central Circle 1(3), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri K.C. Devdas.	
Revenue by:	Shri KPRR Murthy.	
Date of hearing:	07.03.2023	
Date of pronouncement:	16.03.2023	

O R D E R

PER LALIET KUMAR, J.M.

These appeals are filed by the assessee, feeling aggrieved by the separate orders passed by the Commissioner of Income Tax (Appeals) – 11, Hyderabad dt.05.08.2022 wherein the assessing officer's action in imposing penalty of Rs.35,83,457/- for A.Y. 2015-16 and Rs.71,63,856/- for A.Y. 2016-17 in proceedings u/s 271(1)(c) of the Income Tax Act, 1961 (in short the Act) were confirmed, respectively, on the following grounds :

> *"1. The Hon'ble Commissioner Income Tax (Appeals) -11, Hyderabad [for short-Hon.CIT] erred-in confirming penalty order of learned Assessing Officer [for short ¬the learned AO] which penalty , of Rs.35,00,951 was levied u/s 271 (1) (c) of the Income Tax Act, 1961- as the same was bad in law and on the facts of the case.*

2. The learned CIT(A) failed to appreciate the settled position of law supported by judicial precedents that the threshold requirement for initiating and imposing penalty is recording of correct satisfaction in the assessment order which was not done by the Assessing Officer

3. The learned CIT(A) erred in sanctifying the satisfaction recorded by AO by applying the Explanation-1 to section 271(1)(c) which is applicable to concealment of income and/or furnishing inaccurate particulars of income in regular assessments . CIT (A) should have appreciated that the correct Explanation in a search case is Explanation 5A.

4. The learned CIT(A) erred in equating Explanation-1 with Explanation-5A as both the sections have different parameters and they operate in their respective fields. Had the logic applied by learned CIT (A)- been correct, there was no need for the legislature to create a different provision specifically in respect of a search case. This defeats the legislative intention.

5. The learned CIT(A) appeal should have appreciated that when law requires something to be done in a particular manner, the same should be done in that particular manner or not at all.

6. The Hon. CIT erred in concluding that a statement given during the course of search action would equal to discovery of incriminating evidence in course of search which when proved can assume the character concealed income to attract penalty which is duly supported by judicial precedents.

7. The learned CIT (A) should have correctly appreciated the concept of offering income to buy peace and erroneously applied the decision of Apex Court in the case MakData's case, which is factually different.

8. The learned CIT(A)should have considered the entire factual gamut of the case relating to offer of income in respect of works executed through subcontractors who were genuine and in such a situation the appellant's offer was only to give a quietus to litigation. This is evident by the fact that the appellant had not taken credit of such income in its books to attract penalty. It is a well settled principle that an offer to buy peace cannot attract penalty of concealment.

9. The learned CIT (A) summarily rejected the judicial precedents cited by the appellant in stead of distinguishing the same."

2. Similar grounds were raised by the assessee in other appeal also i.e., ITA No.511/Hyd/2022 for A.Y. 2016-17 except the amounts involved in.

3. Before us, at the outset, both the parties submitted that the issues raised in both the appeals were identical. In view of the aforesaid submissions, we, for the sake of convenience proceed to dispose of both the captioned appeals by a consolidated order but however refer to the facts in ITA No.510/Hyd/2022 for the sake of brevity.

4. The brief facts of the case are that assessee company is engaged in Civil Contract works. The assessee filed its return of income for the A.Y. 2015-16 on 31.10.2015 admitting total income of Rs.2,09,48,960/-. Subsequently, scrutiny assessment u/s 143(3) of the Act was completed on 10.10.2017, by assessing the income at Rs. 2,11,91,640/-. Consequent to search & seizure operation u/s 132 in the case of M/s. Moksha Infracon Pvt Ltd on 09.08.2018, this case was centralized to Central Circle-1(3), Hyderabad and accordingly, notice u/s 153C was issued on 18.03.2019 and was duly served on assessee. In response, assessee filed Return of Income on 15.04.2019 by admitting total income of Rs.3,12,48,690/-. Thereafter, scrutiny assessment was completed vide order u/s 153A dt.30.04.2021 by assessing the income at Rs.3,14,91,370/-. Since the assessee had declared additional income of Rs.2,07,00,000/- on account of search only, Assessing Officer had initiated penalty proceedings u/s 271(1)(c) of the Act and passed penalty order u/s 271(1)(c) of the Act on 16.03.2022 levying penalty of Rs.35,83,457/-.

5. Feeling aggrieved by the order passed by the assessing officer, assessee filed appeal before the Ld. CIT(A), who granted partial relief to the assessee.

6. Feeling aggrieved with the order of ld.CIT(A), assessee is now in appeal before us.

7. Before us, ld. AR has submitted that search and seizure operation was conducted in the premises of assessee and during the course of search, the statements of the employees of the assessee were recorded and who have denied to have executed the sub-contracts. It was submitted that the said employees had stated to have made statements saying that the amounts were withdrawn from the bank and had given back as cash to Sri P. Venakteswara Reddy or Sri N. Raja Reddy. Further it was submitted that on the basis of the statements of the employees, the Managing Director of the assessee had admitted additional income of Rs. 9 crores for five years. The break-up of the said amount was given in para 5.51 of the assessment order. It was submitted that the assessee received the notice u/s 153A of the Act on 18.03.2019 for the year under consideration and in response thereto, the assessee filed the return of income admitting the total income of Rs.8,35,03,680/-. It was the contention of the ld.AR that the return filed by the assessee in response to the notice u/s 153A is required to be considered as a return filed u/s 139 of the I.T. Act and therefore, there cannot be any submission of inaccurate particulars of income. Ld.AR has drawn our attention to section 153A to the following effect :

"Assessment in case of search or requisition

153A.67[(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person68 where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—
(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and ***the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;***

8. It was submitted that since the return of income was filed by the assessee in compliance to the notice u/s 153A of the Act admitting the total income and the same was accepted by the Assessing Officer in the assessment proceedings, therefore, it cannot be said that the assessee had submitted inaccurate particulars of income, for which the penalty can be imposed u/s 271(1)(c) of the Act. For the above said purposes, ld.AR had relied upon the decision of Hon'ble Delhi High Court in the case of PCIT Vs. Neeraj Jindal.

"22. The second question concerns the interpretation and application of Explanation-5 to Section 271(1)(c) and whether it is attracted in the facts of this case. For convenience, Explanation 5 is reproduced below:

"Explanation 5: Where in the course of a search initiated under section 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income, -

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein ; or

(b) for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income unless, -

(1) such income is, or the transactions resulting in such income are recorded, -

(i) in a case falling under clause (a), before the date of the search ; and (ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

23.Explanation 5 to Section 271(1) was inserted by the Taxation Laws (Amendment) Act, 1984, with effect from 1 October, 1984. The Explanation is applicable to cases where in the course of a search under Section 132 of the Act, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing. In such cases, if the assessee claims that these assets have been acquired by him by utilizing (wholly or in part) his income for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date, or where such return has been furnished before the said date, such income has not been declared in the return, or such previous year is to end on or after the date of the search, the assessee shall, for the purposes of imposition of penalty under Section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income. This Explanation has been inserted to address situations where consequent to a search, assets and valuables are discovered to be in the possession of the assessee, and thereafter the assessee files return of income after the date of search. In such cases, even if the assessee includes the amounts utilized by him in acquiring the assets found in his possession during the search operations as his income in the

return filed after the search, the assessee would be deemed to have concealed his income. Thus, Parliament has created a deeming fiction by virtue of which in such cases, even if the assessee includes such income (which represents the value of the assets found in his possession during the search) in his return filed after the search, it will be deemed that such return disclosing higher income was filed only because the assets were found in his possession during the search. Put differently, if not for the search, the Legislature deems that the assessee would not have disclosed such income in the return filed subsequently. Explanation 5 also contains two exceptions, where the assessee would not be deemed to have concealed his income and would gain immunity from levy of penalty-first, if such income is or the transactions resulting in such income are recorded in the books of account maintained by the assessee for any source of income or such income was otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of the search; second, in the course of the search, the assessee makes a statement under Section 132(4) that the assets found in his possession have been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of the time specified in Section 139(1), and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such income.

24. The purpose of inserting Explanation-5 in the statute books was explained by the Supreme Court in K.P. Madhusudan v. CIT [2001] 251 ITR 99/118 Taxman 324, wherein the Court held-

"Learned Counsel for the assessee then drew our attention to the judgement of this Court in Sir Shadilal Sugar and General Mills Ltd. v. CIT [1987] 168 ITR 705. He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to he added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this Court in the case of Sir Shadilal Sugar and General Mills Ltd. [1987] 168 ITR 705 and that therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to Section 271 was added."

25. This shows that Explanation 5 was specifically inserted to deal with the situation where higher income was disclosed in the return filed consequent to a search operation, and the assessee claimed that such addition of income did not imply that there was concealment. In other words, but for the insertion of Explanation-5, it would be open to the assessee to contend that additions made to his income in the return filed after the search operation, were only to buy peace and did not tantamount to concealment. This also flows from the language of Explanation 5 itself, wherein the words used by the Legislature are "be deemed to have concealed the particulars of his income", which shows that there is a deeming fiction by virtue of which such additional income is considered as concealment. If such additions in the income in the return filed consequent to a search, were to automatically

evidence concealment under Section 271(1)(c), there would be no need for Parliament to enact a deeming fiction in the form of Explanation 5; such a reading would render Explanation 5 otiose and without any purpose. This is also consonant with the view arrived at in the earlier part of this decision, i.e. mere increase of income in the return filed pursuant to Section 153A would not be sufficient to show concealment under Section 271(1)(c).

26. Now for the Revenue to invoke Explanation 5, it would have to prove that its requirements are clearly fulfilled in the present case. In order for Explanation 5 to apply, it is necessary that there must be certain assets (such as money, bullion etc.) found in the possession of the assessee during the search, and that the assessee must claim that such assets have been acquired by him by utilising (wholly or in part) his income. Moreover, such income must be in relation to a particular previous year that has either ended before the date of the search or is to end on or after the date of the search and such income is declared subsequently in the return of income filed after the search. Therefore, it is only when assets are found during the search which the assessee claims have been acquired by him by utilizing (wholly or in part) his income for any particular previous year, and then declares such income (which he utilized in acquiring the assets found) in a subsequent return filed after the date of search, would it be deemed that the assesee has concealed his income. In other words, the assets seized during the search must relate to the income of the particular assessment year whose return is filed after the date of the search. Such a conclusion is only logical, considering that assessment under the Act is with respect to a particular assessment year and the penalty imposed under Section 271(1)(c) would also be for concealing income in that particular assessment year, which concealment was revealed by the discovery of certain assets in the assessee's possession during the search conducted under Section 132. Here, it would be beneficial to reproduce the dictum of the Rajasthan High Court in CIT v. Kanhaiyalal [2008] 299 ITR 19, where it held that-

"We may consider the things from yet another aspect, viz., that under the set up of IT Act, in whatever eventuality the assessment may have to be made, i.e. whether a regular assessment, or assessment consequent upon escapement of income, or assessment of a block period, but in either case, the assessment has to be, with respect to the particular assessment year, relating to the concerned previous year, and the income derived, or found by the Department to have been derived, or earned, by the assessee, during particular previous year, has to be assessed during the relevant assessment year only, and assessment of such income cannot be shifted to any other past or future years, so much so that there may be cases, where the right of the Department to assessment may have been lost on account of passage of limitation also."

Thus, it is clear that the Revenue has to establish that the assets seized during the search conducted on the assessee, related to the income of the assessee for the relevant assessment years i.e. AY 2005-06 and AY 2006-07.

27. On this question, the decision of the ITAT in Prem Arora (supra) must be noted. In that case, the ITAT held:

"From above discussion it is clear that the provisions of Explanation 5 are applicable in the cases where during the course of search initiated on or before 1.6.2007 any money, bullion, jewellery or other valuable article or thing is found in the possession or under control of the assessee. In the case of the assessee the search was conducted on 22.11.2006 and cash of Rs. 1,11,45,350/- was found from the possession of the assessee. The assessee had undisclosed commission income as well as purchases and sales as seen from the statement of affairs made by the assessee based on seized material. The assessee had drawn cash flow statement for the entire period of six years in order to determine undisclosed income based on seized material for each of six assessment years. Explanation 5 to section 271(1) of the Act cannot be invoked in assessment year 2004-05 merely on presumption that the assessee might have been in possession of cash throughout the period covered by search assessments. The income offered to tax u/s 153A for assessment year 2004-05 is based on entries recorded in the seized material. Unlike provisions of Explanation 5A, the provisions of Explanation 5 cannot be invoked in assessment year 2004-05 in respect of entries recorded in seized material. Thus invoking of Explanation 5 in assessment year 2004-05 is based on presumptions, surmises and conjectures. It is settled law that suspicion howsoever strong, it cannot take place of actual evidence and hence the contention of the Revenue that assessee was in possession of cash throughout the period of six assessment years has to be rejected. In view of above discussion we are of the considered opinion that even the amended provisions of Explanation 5 cannot be applied in assessment year 2004-05. Consequently penalty u/s 271(c) cannot be imposed by invoking Explanation 5 of the Act in assessment year 2004-05 in respect of cash found in previous year relevant to assessment year 2007-08."

28. Basing its reasoning on this decision, the ITAT in the present case held that in the case of the assessee, the search was conducted on 11.01.2007 and cash of Rs.5,26,530/- was recovered from the possession of the assessee; and so the cash was admittedly, not seized during the relevant assessment years in consideration before the Tribunal. In other words, while the assessee had surrendered undisclosed income, the cash was seized during search in A.Y 2007-2008, and not in the relevant assessment years. However, in the relevant assessment year under consideration in the instant case, the assessee made an addition of Rs.21,65,932/- in the return filed pursuant to notice under section 153A. The ITAT held that Explanation 5 to section 271(1) of the Act could not be invoked in assessment years 2005-06 & 2006-07, which are under consideration in this case, merely on the presumption that the assessee might have been in possession of the seized cash throughout the period covered by the search assessments. The learned ITAT also held-

"The income offered to tax u/s 153A for assessment years 2005-06 and 2006-07 cannot be said to be based on assets seized, because from the assessment order, it is clear that search was on 11.01.2007 (i.e AY 2007-08), the cash seized during search was only to the tune of Rs.5,26,530/- and it is not emerging from the records that the assessee has claimed during search that the cash seized (on 11.0 1.2007), belonged to him and that was owned by him in the relevant assessment years i.e. AYs 2005-06 and 2006-07. Unless there is a clear finding in this respect, Explanation 5 of Section 271(1)(c) cannot be of any help to the department. As rightly pointed out by the Coordinate Bench in Prem Arora (supra), the provisions of Explanation 5 cannot be invoked in assessment years 2005-06 and 2006-07 in respect of entries recorded in seized material. Thus invoking of Explanation 5 in assessment year 2005-06 & 2006-07 is based on assumptions and presumptions. It is settled law that suspicion howsoever strong, cannot take the place of evidence and hence the contention of the Revenue that assessee was in possession of cash throughout the period of assessment years under consideration has to be rejected."

It is difficult to see any infirmity in the decision of the learned ITAT in the present case. Levy of penalty under Section 271(1)(c) cannot be on the basis of surmises and conjectures. Thus, Explanation 5 cannot assist the claim of the revenue in the present case for the relevant assessment years under consideration before this Court for the simple reason that for the relevant assessment years, 2005-06 & 2006-07, no material was recovered during the search. Rather, the assessee added Rs.21,65,932/- in the return filed pursuant to notice under section 153A. That amount was not relatable to any sum recovered or article seized. Therefore, the question of adding or not adding amounts after the search and falling within the mischief of Explanation 5 to Section 271 (1) (c) cannot arise in the facts and circumstances of this case.

29. Based on the above discussion, this Court is of the opinion that Explanation 5 cannot be relied upon by the Revenue in the relevant assessment years under consideration before this Court, and in the absence of recourse to Explanation 5, there is no incriminating evidence to show that the assessee has concealed the particulars of his income, within the meaning of Section 271(1)(c) of the Act. In conclusion, this Court is of the view that there is no illegality in the order of the learned ITAT in the present case. In all four appeals, the question of law involved is thus answered in favour of the assessee. The revenue's appeals are therefore dismissed."

9. The ld.AR had further submitted that the assessee had filed the following written submissions :

"1....

2.....The appellant Kaveri Polymers presently known as Kaveri Infra Projects Pvt. Ltd. has been in executing construction contracts and more particularly in execution of drinking water pipeline works for municipalities. If one looks at the various works that were executed during the seven previous years that are relevant for the assessments under search action that had taken place on 09-08-2018 on the appellant's premises one notices that all the works that were executed were only local bodies or similar other government bodies or authorities and not for any private parties. Year wise, party wise list of details of works executed is enclosed to these submissions. As these details are extracted from books of account and as books were already furnished before the learned AO at the time assessment proceedings conducted under section 153A r.w.s., 143(3), it is humbly opined that these details do not constitute any fresh evidence.

3. Since works are executed exclusively for Government authorities and Government Departments the quality and quantity of works executed are kept under a close watch of the well-established systems laid by these government authorities over a period of time. In order words when works are executed for government departments, considering the robust inspection mechanisms that they have, work done bills are sanctioned and funds released when and, only when, the works are actually executed. Since no work can be executed with out incurring expenditure it would be incorrect to conclude on the part of learned AO to conclude that the assessee did not incur the expenditure. As has been submitted at para no.8.3 of submissions made before learned AO dated 24.01.2021 [page number of paper book 72 & 73]. Even from the reply of one of the sub-contractor Sri Paripoorna Chary for question number 10 [page number of paper book 53] it can be seen that amounts were spent on different types of expenditure.

4. The line in which the appellant is engaged more of an informal line, and it has to deal with various kinds of people day in and day out. A lot of hand holding is required to be made by the main contractor even in case of sub- contractors to get the works done in time.

5. Therefore, in the light of above, learned AO as well as Hon.CIT erred in concluding that sub-contractors have not done any work when the entire set of works executed were related to various government departments and departments only."

10. Based on the written submissions that the assessee is working for government departments and periodical verification of the work done by the assessee were undertaken by the said departments and therefore, it cannot be said that the assessee had not executed the work and hence, no addition / penalty can be imposed on the basis of the statement given by the assessee during the search proceedings. The ld.AR further submitted that the assessment proceedings and penalty proceedings are distinct and therefore, in the penalty proceedings, Assessing Officer is required to satisfy independently without being influenced by the outcome of the assessment order. For the above said purpose, the ld.AR had relied on the decision of Hon'ble Supreme Court in the case of Basir Ahmed Sisodia Vs. Income Tax Officer reported in [2020] 116 taxmann.com 375 (SC) wherein the hon'ble Supreme Court has held as under :

> *"14. However, it has now come on record that the appellant/assessee in penalty proceedings offered explanation and caused to produce affidavits and record statements of the concerned unregistered dealers and establish their credentials. That explanation has been accepted by the CIT(A) vide order dated 13.1.2011. In paragraph 17 of the said decision reproduced hitherto, it has been noted that the Officer recorded statements of 12 unregistered dealers out of 13 and their identity was also duly established. After analysing the evidence so produced by the appellant/assessee, the appellate authority [(CIT(A)] noted that the Officer had neither doubted the identity of those dealers nor any adverse comments were offered in reference to their version regarding sale of marble slabs by them to the appellant/assessee in the financial year relevant to assessment year 1998-1999 and receipt of payments after two to three years. Further, there was no denial of purchase of marbles worth Rs.4,78,900/- (Rupees four lakhs seventy-eight thousand nine hundred only) by the assessee and sale thereof worth Rs.3,57,463/- (Rupees three lakhs fifty-seven thousand four hundred sixty three only) with closing stock of Rs.2,92,490/-(Rupees two lakhs ninety two thousand four hundred ninety only), as disclosed in the trading account for the year ended on 31.3.1998. The appellate authority thus found that without purchases of marbles, there could be no sale and disclosure of closing stock in the trading account. In other words, the materials on record would clearly suggest that the concerned unregistered dealers had sold marble slabs on credit to the appellant/assessee, as claimed. As a consequence of this finding, the appellate authority concluded that there was neither any*

concealment of income nor furnishing of inaccurate particulars of income by the assessee. ***We are conscious of the fact that these observations are made by the competent forum (appellate authority) in penalty proceedings under Section 271 of the 1961 Act in favour of the assessee.*** *However, what needs to be noted is that the stated penalty proceedings were the outcome of the assessment order in question concerning assessment year 1998-1999.* ***Indeed, at the time of assessment, the appellant/assessee had failed to produce any explanation or evidence in support of the entries regarding purchases made from unregistered dealers****. In the penalty proceedings, however, the appellant/assessee produced affidavits of 13 unregistered dealers out of whom 12 were examined by the Officer. The Officer recorded their statements and did not find any infirmity therein including about their credentials. The dealers stood by the assertion made by the appellant/assessee about the purchases on credit from them; and which explanation has been accepted by the appellate authority in paragraphs 17 and 19 of the order dated 13.1.2011.*

15. To put it differently, the factual basis on which the Officer formed his opinion in the assessment order dated 30.11.2000 (for assessment year 1998-1999), in regard to addition of Rs.2,26,000/- (Rupees two lakhs twenty six thousand only), stands dispelled by the affidavits and statements of the concerned unregistered dealers in penalty proceedings. That evidence fully supports the claim of the appellant/assessee. The appellate authority vide order dated 13.1.2011, had not only accepted the explanation offered by the appellant/assessee but also recorded a clear finding of fact that there was no concealment of income or furnishing of any inaccurate particulars of income by the appellant/assessee for the assessment year 1998-1999. That now being the indisputable position, it must necessarily follow that the addition of amount of Rs.2,26,000/- (Rupees two lakhs twenty-six thousand only) cannot be justified, much less, maintained.

16. Accordingly, this appeal ought to succeed on this count alone and it would be unnecessary for us to dilate on other questions/contentions urged by the parties as referred to in the earlier part of this judgment."

11. Per contra, ld. DR relied on the orders of lower authorities and further submitted that Assessing Officer had initiated penalty proceedings for furnishing 'inaccurate particulars of income' and penalty was levied on the basis of additional income admitted during search and that assessee was using accommodation entry sub-contractors who are no other than its employees, to inflate expenses and thus, booking bogus expenses would qualify as inaccurate particulars of income. Ld.

DR further submitted that Explanation 5A clearly empowers the Assessing Officer to levy penalty on the additional income so admitted and hence, no need of referring Explanation 5A as the same is a deeming provision.

12. We have heard the rival submissions and perused the material on record. In the present case, search and seizure operation was conducted u/s 132 of the Act in the premises of M/s. Kaveri Infra Projects Pvt. Ltd, wherein the Assessing Officer had observed that the names appearing in the list of sub-contractors are nothing but the names of the employees of the assessee. On perusal of assessment order, we found that when Assessing Officer questioned the employees about the execution of sub-contracts, they admitted that they did not execute any sub-contracts from the assessee company and that the amounts credited to their bank accounts were withdrawn and given back to the directors of the assessee company namely, Sri P. Venkateswara Reddy and Sri N. Raja Reddy and that when the Assessing Officer confronted the same with the said directors, the assessee had admitted the additional income of Rs.9 crores. It is a clear case of admitting additional income only on account of search and not voluntary. As mentioned hereinabove, the assessee on the basis of admission made during the course of search had admitted the additional income of Rs.9 crores and thereafter, filed the return of income thereby admitting the additional income during the year under consideration. Therefore, the present case is not a case of any erroneous misimpression or misconception of law as the assessee after due care and caution and considering the record had filed the return of income admitting the additional income. In the present case, original return of income was filed on 03.10.2016 and thereafter, the search took place on 09.08.2018 when the statement of the managing director of the assessee was recorded and who had

agreed and admitted the additional income of Rs.9 crores for five years. Thereafter, the assessee filed the return of income on 15.04.2019 thereby admitting the additional income which was admitted during the course of search. Had there was any confusion or misunderstanding, then there was no reason for the assessee to file the return of income accepting the additional income in return of income on 15.04.2019. Once the assessee had accepted the admission made during the course of search and thereafter honoured it after more than ten months then there cannot be any scope of any confusion, suspicion or doubt in the mind of the assessee.

13. In the present case, the assessee had filed the return of income for the A.Y. 2016-17 on 03.10.2016 admitting the total income of Rs.6,28,00,980/-. However, the assessee while filing the return of income in pursuance to the notice u/s. 153A had admitted the total income of Rs.8,35,03,680/-. In other words, the assessee had admitted additional income of Rs.2,07,00,000/- after the search took place at the premises of assessee. The above said clearly shows that the additional income was declared only after the search and had there been no search, the additional income would not have been disclosed by the assessee. The inference which can be safely drawn from the chain of events is that the assessee has not filed the correct particulars of income while filing the return of income on 03.10.2016. In the above said facts, the Assessing Officer after recording satisfaction in the assessment order had imposed the penalty. The argument of the assessee that it has not filed the inaccurate particulars of income has no legs to stand as the return filed pursuant to section 153A cannot be said to be a return originally filed u/s 139 of the Act. The bare reading of section 153A of the Act makes it abundantly clear that the return filed in response to section 153A is required to be filed in the prescribed form and verified in the prescribed

manner as are required for the section 139 of the Act. Section 153A no where suggests that the said return shall be a return u/s. 139 of the Act. We do not find any reason to subscribe to the view canvassed before us by the ld.AR for the assessee.

14. Further, the decision relied upon by the ld.AR in the case of Niraj Jindal (supra) is not applicable to the facts of the present case as the Explanation 5A was inserted by the Finance Act, 2009, w.e.f. 01.06.2007 and it has provide as under :

> *"[Explanation 5A.— Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—*
>
> *(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or*
>
> *(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,—*
>
> *(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or*
>
> *(b) the due date16 for filing the return of income for such previous year has expired but the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]*

15. In the present case, search has taken place in the premises of assessee on 09.08.2018 and in the search, the assessee had declared the income in the return of income filed after the date of search and admitted the addition, therefore, Explanation 5A shall be squarely applicable to the facts of the case against the assessee and therefore, the lower authorities have rightly imposed the penalty. As it is clear from the facts in

the case of Neeraj Jindal (supra), the assessment year under consideration is 2005-06 i.e., prior to 01.06.2007 and therefore, the said decision is not applicable to the facts of the present case. Even otherwise, once the assessee admits the additional income during the course of search and thereafter filed return of income admitting the additional income declared during the course of search, it clearly establishes that the earlier return of income filed by the assessee was not correct and the assessee filed the inaccurate particulars of income and had claimed additional expenditure which was not required to be claimed by it.

16. So far as the other argument that the penalty proceedings are independent proceedings and therefore, the documents filed during the course of penalty proceedings are required to be considered is concerned, we find in the present case, the Managing Director of the assessee company had admitted and declared Rs.9 crore as additional income for five years. The said statement of the Managing Director has not been retracted by him till date. Besides the statement of the Managing Director, the assessee had also recorded the statements of sub-contractors / employees of the assessee wherein they had categorically admitted during the course of search. In the sworn statement of Ponuganti Paripurnachary, one of the employees of the assessee, the following answer was given to the question of Revenue.

> *"Q.9 As seen from the financials of the company payments towards sub-contracts were made in your name as below :*

Sl.No	*F.Y.*	*Amount*
1	*2013-14*	*73,04,237*
2	*2014-15*	*72,75,045*
3	*2015-16*	*78,30,409*
4	*2016-17*	*82,74,500*
5	*2017-18*	*19,50,500*
Total		*3,26,34,691*

Ans : As stated above, I have not undertaken any sub-contracts from M/s. Kaveri Infra Projects Pvt. Ltd. I have returned the amount credited to my account by way of self cheques or by way of cash to Sri N. Raja Reddy and to Sri P. Venkateswar Reddy."

17. Similarly, on the above said line, the other employees / sub-contractors had made similar statements admitting that no work under sub-contract had been executed by them. In the above said facts, the Managing Director of the assessee had admitted the additional income during the course of search and thus, thereby restrained the Revenue to go deeper into the affairs of the assessee and collect clinching evidence against the assessee. In our view, the assessee cannot take the benefit of being a contractor working for the Government and was subject to various supervision and inspection etc and further, the deduction of TDS at the time of making the payment and submitting the final bill and completion is of no use to the assessee. In our view, the revenue authorities had thoroughly examined the issue and thereafter had concludes that penalty is leviable on the assessee. Further, we may point out that in the case of Basir Ahmed Sisodia (supra), no evidence was filed by the assessee during the course of assessment proceedings and the affidavits and recorded statements of the concerned unregistered dealers were filed in the penalty proceedings. In the present case, there is no retraction of the statement either by the Managing Director of the assessee or the employees of the assessee that no work has been done, therefore, the facts of the present case are entirely different. Moreover, the assessee had made the statement on the basis of incriminating material and the evidence unearthed during the search and seizure operation which was coupled with the statements of the employees and managing director, which lead to admission of additional income by the assessee. Had there been no search, there was no reason for the assessee to admit

additional income in the return of income filed in response to notice u/s 153A of the Act. In the light of the above, we do not find any reason to interfere with the order of ld.CIT(A). Thus, the appeal of the assessee is dismissed.

18. In the result, the appeal of assessee in ITA No.510/Hyd/2022 is dismissed.

19. As far as the other appeal is concerned, in view of the submission of both the parties that the issues raised in A.Y. 201-16 are identical to the other assessment year, we for the reasons stated hereinabove while deciding the appeal in ITA 510/Hyd/2022 and for similar reasons, dismiss the other appeal also.

20. To sum up, both the appeals of assessee are dismissed. A copy of the same may be placed in respective case files.

Order pronounced in the Open Court on 16th March, 2023.

Sd/-	**Sd/-**
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, dated 16th March, 2023.
TYNM/sps

Copy to:

S.No	Addresses
1	1. Kaveri Infra Projects Private Limited, 24-641 ABK MALL, RAMNAGAR, HANAMKONDA, 506001, Warangal, Telangana, India. 2. M Poorna Chander Rao., Partner Sriramamurthy & Co., Chartered Accountant, H.No.6-3-185, Flat No.201, Sai Damodar Residency, New Bhoiguda, Secunderabad, Hyderabad 500080.
2	DCIT, Central Circle – 1(3), Hyderabad.
3	PCIT (Central), Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order